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this possession was delivered both to Jiwa Ram and Musammat Rupo. It follows, therefore, that Jiwa Ram's possession continued from the 4th of May, 1910, till the 20th of April, 1913, when Nand Ram was restored to possession of that portion of the property which was found to be *waqf*.

Such being the state of things, we do not see why the liability of Jiwa Ram *qua* this sum of Rs. 1,691-3-0 should be limited in the manner suggested. He is the adopted son of Gobardhan Das and is the owner of the estate. He represents the estate in its entirety; and in this view of the facts we think that in the present proceedings Jiwa Ram should also be made liable for the sum of Rs. 1,691-3-0 without any limitation of his liability. In other words, Jiwa Ram's liability to pay this sum is not dependent upon any assets which he has taken from Musammat Rupo, if indeed he has taken any assets from her at all.

The result, therefore, is that the appellant's case fails. We dismiss the appeal with costs to respondents. We direct, however, that the decree be amended so as to make it clear that the total sum awarded is payable by Jiwa Ram, appellant, to the respondent Nand Ram.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Stuart.

MUBARAK FATIMA (PLAINTIFF) *v.* MUHAMMAD QULI KHAN (DEFENDANT).*

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February, 22.

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 201—*Evidence—Presumption—Suit for profits—Alteration in revenue records as to extent of plaintiff's share during the period covered by the suit.*

Where, in a suit for profits, it is found that there has been an alteration in the revenue record prior to the institution of the suit but made during the period for which profits are claimed, the duty of the court must be to consider the order by which the alteration was made and to give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of an eight anna share in a mahal during the first year of the period in respect of

* Second Appeal No. 880 of 1920, from a decree of Kshirod Gopal Banerji, Additional Judge of Bareilly, dated the 10th of April, 1920, confirming a decree of Ibrahim Husain, Assistant Collector, First Class of Bareilly, dated the 17th of December, 1919.

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which profits were claimed, and it were shown that after the close of that year he had been recorded as proprietor of a four anna share only, upon a finding that he had transferred his interest in the remaining four anna share after the close of the first year in suit, then the duty of the court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When however, it is clear, upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the Revenue Court is bound to give effect to the entry as it stood on the date of the institution of the suit.

Durga Prasad v. *Hazari Singh* (1), *Lachman Prasad* v. *Shitabo Kunwar* (2), and *Mubarak Fatima* v. *Muhammad Quli Khan* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Mukhtar Ahmad*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondent.

PIGGOTT and STUART, JJ. :—This is a plaintiff's appeal in a suit for profits. These were claimed on account of three years, 1323, 1324 and 1325 Fasli, in respect of a share of 7¼ biswas and odd in a certain mahal. The defendant replied that the plaintiff was the proprietor only of a share of 12 biswansis and odd, that is to say, about one-twelfth of the share stated in the plaint. The court found that during the years 1323 and 1324 Fasli the plaintiff stood recorded as proprietor of the entire share claimed by her, but that this entry had been altered under the orders of a Revenue Court, and the entry recording the plaintiff as proprietor of only 12 biswansis and odd had been made before the commencement of the revenue year 1325 Fasli. Both the courts below have held that the entry of the year 1325 Fasli, made before the institution of the present suit, raised an irrebuttable presumption that the plaintiff's share was only that shown in the said entry (namely 12 biswansis and odd), and they have based their decrees upon this finding. In appeal before us two points have been raised, and we may note that three have been argued. With respect to the third point, it is only necessary for us to say that a plea was taken before us in argument which we cannot find in the memorandum of appeal to this Court and which was not even taken by the plaintiff in her appeal to the lower appellate

(1) (1911) I. L. R., 33 All., 799. (2) (1920) I. L. R., 42 All., 177.
(3) (1921) I. L. R., 43 All., 697.

court. The contention is that, even on the share of 12 biswansis and odd and the figures given in the patwari's statement and accepted by both the courts below, the sum in arithmetic has been so worked out as to give the plaintiff less than her lawful dues. We have not looked into this matter or allowed the point to be taken. It was essentially one of fact, to be determined by the lower appellate court and, not having been taken at all in that court, must be held to be concluded against the plaintiff by the decision of that court. With respect to the extent of the plaintiff's share, the memorandum of appeal raises two distinct points. The first of these is that the irrebuttable presumption recognized by this Court in the Full Bench decision of *Durga Prasad* v. *Hazari Singh* (1) should be applied to each one of the three years in suit in accordance with the entries in the revenue records as they stood at the commencement of each of those years. If this contention were adopted, the plaintiff would be entitled to profits calculated on the share as claimed in the plaint in respect of each of the years 1323 and 1324 Fasli, and to profits on the smaller share of 12 biswansis and odd in respect of the third year only. We have been referred to two decisions of this Court, one of which was in a suit for profits between the same parties. This is the case of *Mubarak Fatima* v. *Muhammad Quli Khan* (2). Reference is made in that judgment to a previous decision by another Bench of this Court in the case of *Lachman Prasad* v. *Shitabo Kunwar* (3). These two cases are authority for this proposition, that if on the date of the institution of a suit for profits the plaintiff's name stands in the revenue record as the proprietor of a certain share, the Revenue Courts are bound to presume the correctness of that entry and to frame their decree for profits accordingly, in spite of the fact that during the pendency of the litigation (either in the trial court, or in a subsequent appeal, or in second appeal) there may have been an order of the Revenue Court altering the entry in question. These cases are, therefore, distinguishable from the one now before us, in which there had been an alteration in the revenue record prior to the institution of the suit. We have to consider the question now raised independently of any express

(1) (1911) I. L. R., 33 All., 799. (2) (1921) I. L. R., 43 All., 697.
(3) (1920) I. L. R., 43 All., 177.

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authority of this Court to which we have been referred. It seems to us that in a case like the one before us, when there has been an alteration in the revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the said court trying a suit for profits must be to consider the order by which the alteration was made and give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of an eight anna share in a mahal during the first year of the period in respect of which profits were claimed, and it were shown that after the close of that year he had been recorded as proprietor of a four anna share only, upon a finding that he had transferred his interest in the remaining four anna share after the close of the first year in suit, then the duty of the court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue paper. When, however, it is clear, upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the Revenue Court is bound to give effect to the entry as it stood on the date of the institution of the suit. Applying this principle to the present case, the decision of the courts below calculating the plaintiff's share of profits on the basis of her being the proprietor of a share of 12 biswansis and odd only appears correct. There is, however, a further point to be considered, which arises out of the decision of this Court in the case of *Mubarak Fatima* v. *Muhammad Quli Khan* (1). That decision was pronounced on the 23rd of May, 1921, that is to say, after the decision of the lower appellate court in the case now before us, and indeed after the institution of the present appeal. The learned Judges had before them the order of the Revenue Court by which the village papers were corrected with effect from the year 1325 *Fasli* and they considered that order in connection with the decision of a Civil Court upon which it purported to be founded. They came to the conclusion that, as a matter of fact, the Revenue Court had misunderstood the Civil Court's decision

(1) (1921) I. L. R., 43 All., 497.

and had ordered the plaintiff's name to be recorded in respect of a smaller share than that awarded to her in the Civil Court litigation. So far as we can understand the matter, the opinion of the learned Judges in the case above referred to was that the plaintiff had been found by the Civil Court to be entitled in her own right to one-sixth of a share of 7 biswas and odd, which is evidently just double the share in respect of which she was recorded as proprietor by the Revenue Court and in the papers on the basis of which the decree under appeal was framed. Assuming, as we must do, that this decision was correct, it would seem that the courts below have, as a matter of fact, awarded the plaintiff on account of each of the three years in suit only one-half of the profits which she would have obtained if the Revenue Court had not misunderstood the decree of the Civil Court upon which it professed to act. We think, however, that it is impossible for us in the present suit to give the plaintiff any relief on the basis of the contention. The presumption raised by the Revenue Court records must be applied either one way or the other. According to the plaintiff appellant it ought to be applied so as to treat her as proprietor of the entire share of seven biswas and odd during each of the years 1323 and 1324 Fasli, a contention which we have already repelled. If we had acceded to this contention, the plaintiff would have received a great deal too much. The only alternative for us, so far as the present suit is concerned, is to accept the revenue record as it stood on the date on which the present suit was instituted and to affirm the decree under appeal, although it proceeds upon an entry made in accordance with a Revenue Court decision which this Court has pronounced to be erroneous. The effect of the present suit will apparently be to dispossess the plaintiff to the extent of one-half of the share which the learned Judges of this Court in the former litigation pronounced to be her rightful share. We fear that we have to leave the plaintiff to seek an appropriate remedy for this dispossession in a further Civil Court litigation, unless she can persuade the Revenue Courts by means of a fresh application to re-consider their own order respecting the entry in the Revenue records in the light of the decision pronounced by this Court and to make a further correction. Even if this were done now, the actual result would be a temporary dispossession of the

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plaintiff in respect of the years covered by this suit, and for this we can see no remedy other than by way of suit in a Civil Court. As the case stands, we must dismiss this appeal, and we do so accordingly with costs.

Appeal dismissed.

Before Mr. Justice Ryves and Mr Justice Gokul Prasad.

1922
February, 27.

BUDHI LAL AND ANOTHER (DEFENDANTS) *v.* THE ADMINISTRATOR GENERAL OF MADRAS (PLAINTIFF) AND INAM-ULLAH (DEFENDANT).*

Mortgage—Prior and subsequent mortgages—Suit by second mortgagee for sale of the mortgaged property which had been already sold in a suit to which he was not made a party—Form of decree—Rights of auction purchaser.

The general rule is that where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage. *Cangayam Venkataramana Iyer* v. *Comperts*, (1) referred to.

This rule applies equally to auction purchasers and to private purchasers. *Mati-ullah Khan* v. *Banwari Lal* (2) and *Manohar Lal* v. *Ram Babu* (3) referred to.

In such a case the auction purchaser cannot claim to be repaid money which he has spent on improving the mortgaged property. *Cangayam Venkataramana Iyer* v. *Comperts* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—The circumstances giving rise to this appeal are as follows:—Inam-ullah, defendant No. 1, made a mortgage of a grove in favour of Mannu Lal, defendant appellant, on the 1st of June, 1906. On the 6th of July, 1910, he made a second mortgage of the same grove in favour of Shamshad Ali who is now represented by the plaintiff respondent. In 1915 the first mortgagee brought a suit and obtained a decree for sale. To this suit the second mortgagee Shamshad Ali was not made a party and, therefore, his rights, whatever

* Second Appeal No. 1239 of 1920, from a decree of E. Bennet, District Judge of Farrukhabad, dated the 5th of August, 1920, modifying a decree of Ganga Prasad Varma, Munsif of Kannuj, dated the 23rd of April, 1920.

(1) (1908) I. L. R., 31 Mad., 425. (2) (1909) I. L. R., 32 All., 138.
(3) (1912) I. L. R., 34 All., 323.